No. 83-1752

In The

Supreme Court of the United States

October Term, 1983

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HUBERT H. HUMPHREY, III
Attorney General of the State of Minnesota;
MINNESOTA PUBLIC UTILITIES COMMISSION; and
MINNESOTA DEPARTMENT OF PUBLIC SERVICE,

Petitioners,

vs.

NORTHERN STATES POWER COMPANY, and
MINNESOTA PUBLIC INTEREST RESEARCH
GROUP,

Respondents.

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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FOR THE STATE OF NORTH CAROLINA
AND THE PUBLIC STAFF OF
THE NORTH CAROLINA UTILITIES COMMISSION
RUFUS L. EDMISTEN
Attorney General
JO ANNE SANFORD*
Special Deputy Attorney General
ANGELINE M. MALETTO
Associate Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919) 733-7214
ROBERT P. GRUBER, ESQ.
Executive Director, Public Staff
Post Office Box 991
Raleigh, North Carolina 27602-0991
(919) 733-2435
*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

LIST OF AMICI

FOR THE STATE OF CONNECTICUT
JOSEPH I. LIEBERMAN
Attorney General

Robert S. Golden, Jr.
Assistant Attorney General
One Central Park Plaza
New Britain, Connecticut 06051
(203) 827-1553

FOR THE STATE OF HAWAII
TANY S. HONG
Attorney General
Room 405, State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

FOR THE STATE OF ILLINOIS
NEIL F. HARTIGAN
Attorney General

Paul P. Biebl, Jr.
First Assistant Attorney General

Michael J. Hayes
Assistant Attorney General
160 N. LaSalle
Room 900
Chicago, Illinois 60601
(312) 793-7642

FOR THE STATE OF KANSAS
ROBERT T. STEPHAN
Attorney General
Kansas Judicial Center
2nd Floor
Topeka, Kansas 66612
(913) 296-2215

FOR THE STATE OF LOUISIANA
WILLIAM J. GUSTE, JR.
Attorney General
7th Floor, 2-3-4 Loyola Bldg.
New Orleans, Louisiana 70112-2096
(504) 568-5575

FOR THE STATE OF MICHIGAN AND THE MICHIGAN PUBLIC SERVICE COMMISSION
FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General

Don L. Keskey
Assistant Attorney General
1000 Long Boulevard, Suite 11
Lansing, Michigan
(517) 373-7584

FOR THE STATE OF MISSISSIPPI
EDWIN LLOYD PITTMAN
Attorney General

Frank Spencer
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

FOR THE STATE OF MISSOURI
JOHN ASHCROFT
Attorney General

Richard L. Wieler
Assistant Attorney General
Post Office Box 899
Jefferson City, Missouri 65102

FOR THE STATE OF NEW JERSEY
IRWIN I. KIMMERMAN
Attorney General

Carla Vivian Bello
Deputy Attorney General
1100 Raymond Boulevard
Newark, New Jersey 07102
(201) 648-3510

FOR THE STATE OF OHIO
ANTHONY J. CELEBREZZE
Attorney General

Robert J. Tongren
Section Chief, Public Utilities

Martin J. Marz
Assistant Attorney General
375 S. High Street
Columbus, Ohio 43215
(614) 466-0226

FOR THE STATE OF
RHODE ISLAND
DENNIS J. ROBERTS, II
Attorney General
Department of the Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

FOR THE STATE OF
SOUTH CAROLINA
T. TRAVIS MEDLOCK
Attorney General

James M. Holly, Esquire
Executive Assistant for Administration

John P. Wilson
Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

FOR THE STATE OF TEXAS
JIM MATTOX
Attorney General

Fernando Rodriquez
Assistant Attorney General
Post Office Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 475-1101

FOR THE STATE OF VERMONT
JOHN J. EASTON, JR.
Attorney General
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

FOR THE STATE OF WYOMING
A. G. McCLINTOCK
Attorney General

Steven R. Shanahan
Senior Assistant Attorney General

Michael L. Hubbard
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

QUESTION PRESENTED

Where the Federal Energy Regulatory Commission approves an agreement allocating costs of an abandoned electric power plant project between an electric utility company and its wholly owned subsidiary, does the Federal Power Act require that a state treat the approved agreement as a wholesale rate and, therefore, preempt the state from determining whether the abandonment costs will be borne by the company or by retail electric customers.

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The States joined herein file this brief *amicus curiae* in support of Petitioner's Petition for Writ of Certiorari, pursuant to Rule 36.1 of the Rules of the Supreme Court.

INTEREST OF AMICI

At interest here is the proper division of authority between a federal agency and state utility commissions to establish electric utility rates. If upheld, the decision of the Minnesota State Supreme Court would affect every state: It would allow utility companies to circumvent state

utility commission scrutiny on ratemaking issues simply by establishing holding companies and separate subsidiaries which would apply to the Federal Energy Regulatory Commission for wholesale rates. These wholesale rates then would be passed on directly to consumers without any review at the state level. The traditional power and authority of the state regulatory commissions at best would be severely eroded, if not destroyed completely. *Amici* consider this case to have far-reaching significance because it allows a serious intrusion by a federal agency into retail rate settings traditionally authorized by state legislatures to their utilities commissions.

By this brief *amicus curiae* the states noted herein join petitioner's request that the substantial federal question which they represent be accorded plenary consideration by the Supreme Court, so that the decision of the Minnesota Supreme Court may be reversed.

ARGUMENT

I. Congress did not intend for the Federal Power Act to be used by utilities through corporate manipulation to circumvent state regulatory scrutiny over utility rates.

Regulation of utilities has been acknowledged by this Supreme Court to be "one of the most important functions traditionally associated with the police power of the states." *Arkansas Electric Coop. Corp. v. Arkansas Public Service Commission,* — U.S. —, 103 S. Ct. 1905 (1983).

If the action of the Minnesota Supreme Court in up-holding a Coordinating-Agreement amendment as a wholesale rate and not subject to state review is not challenged, then state regulation of utilities as it exists today will be destroyed. One effective way might be for utility companies across the country to designate one or more of their generating plants located outside the corporate headquarters in another state as separate subsidiaries which could sell electric power or fuel back to the holding company or to another subsidiary. "Coordinating Agreements" could be established with the Federal Energy Regulatory Commission ("FERC"). These "interstate" transactions would then be subject to FERC which would establish wholesale rates. The subsidiaries would sell electricity at this wholesale rate back to the holding company which then would pass that rate directly to ratepayers, and thereby avoid all state utility commission scrutiny.

The Federal Power Act ("FPA") was enacted by Congress specifically to "fill the gap" created by judicial decisions concerning state versus federal regulation of utility transactions. Through the FPA, Congress undertook to establish federal regulation over most of the wholesale transactions of electric and gas utilities engaged in interstate commerce. *Arkansas Public Service Comm'n, Id.* at 1909. Through this legislation Congress intended to establish constitutional limitations upon state regulatory power to ensure that major aspects of interstate transmission and sale would not go unregulated. *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205 (1964) at 213. Congress did not intend, however, for the FPA to be used by utilities through corporate manipulation to circumvent state regulatory scrutiny. The

Minnesota Supreme Court decision opens the door for utility companies to employ corporate legerdemain to avoid state jurisdiction concerning utility rates.

The FPA extends federal regulatory power to the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C.A. § 824(b) (1974, 1984 Supp.). This Federal regulation, however, extends only to "those matters which are not subject to regulation by the states." 16 U.S.C.A. § 824(a) (1974, 1984 Supp.).

It is well established that states have the authority to regulate the rates to be charged by a utility for its product or service, subject to the requirement that these rates be reasonable, just, and non-discriminatory. 73B C.J.S. Public Utilities § 17. The primary mission of a regulatory body is to protect the consumer; it must "strive to reach a balance between consumer, producer, and those whose interests fall in between." *Public Service Commission for the State of New York v. Federal Power Commission*, 467 F.2d 361 (D.C. Cir. 1972). The Minnesota Supreme Court ruling prevents the state utility commission from protecting its consumers by requiring the regulatory agency to accept the FERC-approved wholesale rate without review or question. This ruling specifically imposes plant abandonment losses on Minnesota consumers with no accountability from the utility company as generally required. Thus the Minnesota Supreme Court decision rendered the state regulatory commission powerless over the utility and forced Minnesota consumers to pay for abandonment losses on the Tyrone nuclear plant which had been cancelled after the utility company failed to meet the requirements of the state commission's "need test."

II. The Minnesota Supreme Court decision will be used by utility companies to avoid strict scrutiny by State Regulatory commissions, especially in such volatile areas as plant abandonment losses.

The effects of this Minnesota Supreme Court decision will result in catastrophic consequences if other utilities can follow the novel approach taken by NSP to circumvent state utility ratemaking jurisdiction: NSP wanted to dump approximately $75 million of its plant abandonment losses onto its customers.[1] Generally, state regulatory commissions strictly scrutinize plant abandonment losses to determine whether recovery, if any, should be born by the utility ratepayers, utility shareholders, or income-taxpayers.[2] Each regulatory commission chooses a specific method of allocation and then allocates most of a plant's abandonment costs among these three groups. The commission determines what portion of the abandonment costs were prudently incurred by plant management; only those costs prudently incurred would be eligible for recovery from ratepayers. The regulatory commission then allocates those eligible costs and the utility may recover all, none, or a portion of its abandonment costs in rates. *See, generally, Nuclear Plant Cancellations: Causes, Costs, and Consequences*, U.S. Department of Energy Document Number DOE-EIA-0392 (April, 1983).

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1. Abandonment losses are those costs which would have been avoided if the project had never been undertaken. *Nuclear Plant Cancellations, Id.*, p. xiii.

2. Income taxpayers become involved because the Federal and State governments lose or gain income tax revenues on the basis of the specific regulatory method used to allocate abandonment costs. *Id.* at 38.

Plant abandonment losses have become a volatile issue since the nation's electric utility industry began cancelling almost half the nuclear capacity it had ordered since the inception of commercial power. *Id.*, p. ix. State regulatory commissions struggle to determine who should bear the losses resulting from the abandonment of plants. Some states statutorily disallow plant abandonment loss recovery completely; others prohibit recovery of costs associated with construction projects which are terminated before ever providing service to utility customers.[3] Some regulatory commissions require the stockholders bear the loss since the decision to embark upon the cancelled project was made by their representatives who had an opportunity to calculate the risk and be governed by such calculation. The rationale behind this approach is that if the utility gauged the risk with the intention that the loss would be borne by consumers, there would be no risk at all for the utility stockholders. See *Pacific Power & Light v. Public Service Commission*, — Wyo. —, 677 P.2d 799 (Wyo. 1984). In that *Pacific Power & Light* case, the Wyoming Supreme Court upheld the decision of the state regulatory commission to disallow recovery of costs of investment, expenses and obligations resulting from the abandoned projects because those losses failed to conform to the "used and useful" language of the Wyoming statute. That statute provides in part:

> In conducting any investigation pursuant to the provisions of this act the commission may investigate, con-

3. See 1983 Conn. Acts 239 (Reg. Sess.); N.H. Rev. Stat. Ann. 378:30a (1979); N.D. Cent. Code 49-02-02(C (1981); Ohio Rev. Code Ann. 4909.15A(4) (Page 1983); Or. Rev. Stat. 757.355 (1979).

> sider and determine such matters as the cost or value, or both, of the property and business of any public utility, *used and useful for the convenience of the public,* and all matters affecting or influencing such cost or value * * * (Emphasis added.) Wyo. Stat. 37-2-119, (1977).

The Wyoming court upheld the state commission's ruling and reiterated the commission's critical role in determining allocation of plant abandonment losses. It stated:

> If the consumers are to take the risk, it would seem that they should have some say as to whether or not the projects are to be undertaken. Only [the Public Service Commission] is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility.

Pacific Power & Light, Id. at 806.

Whereas the Wyoming court supported its state commission's authority to review abandonment losses, the Minnesota court completely stripped its state commission of all power and authority to review these kinds of losses. The type of abandonment losses which NSP wanted to recover is of critical importance. NSP sought to recover approximately $75 million for expenses incurred prior to securing the certificate of need, the basic regulatory approval. (Petitioner's brief, p. 4) Generally, utilities do not incur significant costs until after they apply to the Nuclear Regulatory Commission ("NRC") for a construction permit, which involves a $125,000 application fee, and after they order a nuclear steam supply system. *Nuclear Plant Cancellations, Id.* at 3. Thus, neither announcement of construction plans nor application to the NRC can be considered a significant financial commitment to plant

construction. *Id.* NSP, however, incurred millions of dollars of losses through penalty clause payments to vendors and contractors under contracts which failed to contain provisions negating the penalty clauses if the certificate of need were denied. Under typical circumstances, such an exhorbitant expense resul ng from an abuse of managerial discretion might not be recoverable from consumers. But because of the Minnesota court ruling, the MPUC and all the Minnesota consumers were stuck with paying for this blunder and probably will continue to pay for a long time.[4] Should the Minnesota Supreme Court decision not be reviewed and therefore allowed to stand, the consequences would be disastrous: *No* utility would be accountable to state regulatory commissions. There would be no effective way to penalize utilities for poor management decisions. There would be no state consumer representation and no way to assign risks of loss to shareholders. In short, utilities would enjoy carte blanche to recover any costs and charge any rate, merely by creating questionable coordinating agreements.

Plant abandonment losses would not be the only costs involved. Construction Work In Progress (CWIP), and fuel costs also could be included under FERC-determined

4. When a nuclear plant is cancelled, there a e likely to be numerous contracts in existence covering work not yet completed or paid for. Because disbursements are likely to be spread over the entire period, the full cost of these contracts is not reflected in the cumulative direct expenditures. Although the utility could be held for the full value of these contracts, a settlement for some lesser amount is normally negotiated between the utility and various vendors. Still, this component of abandonment cost can be quite substantial and may not be accurately known until several years after the cancellation date if lengthy negotiations ensue. *(Nuclear Plant Cancellations, Id.,* at 37).

wholesale rates. This would result in extensive removal from scrutiny by state commissions of these expenses generally considered in ratemaking. Some specific examples of this potential effect are described below:

STATEMENT OF CONNECTICUT'S INTEREST

The State of Connecticut, being a New England State, finds its ratemaking authority jeopardized by the wrong conclusions of the Minnesota Supreme Court. In New England, local state electric utilities often jointly sponsor the development of generating facilities. In the past twenty years all generating facilities in New England resulted from some consortium arrangement of utility companies from neighboring states.

Connecticut traditionally has regulated the prudence of her utilities investments in such projects—particularly when such facilities are not completed. When the Connecticut Public Utilities Control Authority (now the Department of Public Utility Control) determined that it would be imprudent for the Hartford Electric Light Company and Connecticut Light and Power Company to continue development of a nuclear power station in Massachusetts it specifically denied the companies revenues associated with the project. *In re Application of Connecticut Light and Power Co. and Hartford Electric Light Company*, Connecticut PUCA decision Nos. 770319 and 770320 (1978). Later, after cancellation, the Connecticut Public Utilities Control Authority ruled on the prudence and ratemaking treatment of the cancelled investment. *In re*

Application of Connecticut Light and Power Co. and Hartford Electric Light Company, Connecticut PUCA Decision Nos. 810602 and 810604 (1982).

Today Connecticut faces an immediate concern because of the heavy investment of Connecticut's United Illuminating Company and Connecticut Light and Power Company in the Seabrook Nuclear Power Projects I and II in New Hampshire. The current proposed solution to resolving the financial crisis surrounding these troubled projects is to form a consortium of participating utilities which would take over from the current lead utility, Public Service Company of New Hampshire, the responsibility of salvaging one of the two units under construction. Such a plan will undoubtedly require FERC approval.

Since utility regulation, is exemplar of the federal-state dualistic approach of governing, each participating utility will need local state approvals before participating in any salvage plan. The Minnesota Court decision is disturbing because after the utility receives state approval, the consortium then could go to the Federal Energy Regulatory Commission, should the salvage plan fail and—following the Minnesota Court's reasoning—the utility would impose on local state ratepayers any loss allocation plan, but this time completely ignoring the state agency except for accomplishing the pass-through in retail rates. In effect, the Minnesota Supreme Court's decision creates a one way street which ignores the historic role of states in the economic regulation of its public utilities.

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STATEMENT OF NEW JERSEY'S INTEREST

The New Jersey Board of Public Utilities (Board), pursuant to *N.J.S.A.* 48:2-13 is vested with "general supervision and regulation of . . . jurisdiction and control over all public utilities." The Board's ratemaking authority, set forth in *N.J. Stat. Ann* 48:2-21, 21:1 and 21.2, and the scope of its discretion in exercising that authority, have long been judicially interpreted in the broadest and most encompassing manner. See *Public Service Coordinated Transport v. State,* 5 *N.J.* 196 at 214, 74 A.2d 530. (1950); *New Jersey Bell Telephone Company v. Board of Public Utility Commissioners,* 12 *N.J.* 568, 97 A.2d 602 (1953).

The decision of the Minnesota Supreme Court, insofar as it compels a state utility ratemaking body to include in retail rates FERC approved cost allocations among affiliated companies, threatens to undermine the Board's traditional ratemaking discretion in one of the most sensitive areas of the Board's current responsibilities. New Jersey is particularly concerned with the precedent set by the Minnesota Supreme Court. Jersey Central Power & Light Company, a New Jersey public utility, shares ownership and power from the Three Mile Island nuclear facility (TMI) in Pennsylvania with its parent company, General Public Utilities (GPU) and sister subsidiary, Metropolitan Edison (MET ED). Were TMI to be abandoned, the Minnesota Supreme Court decision could be used to circumvent local rate jurisdiction and compel inclusion of abandonment costs in rates charged New Jersey customers. It is imperative, therefore, that accounting agreement between a parent company and subsidiaries not be

permitted to preempt traditional state ratemaking review as the Minnesota Supreme Court has allowed.

STATEMENT OF NORTH CAROLINA'S INTEREST

The North Carolina Utilities Commission ("Commission"), pursuant to North Carolina General Statutes § 62-2, is vested with the authority "to regulate public utilities generally, their rates, services and operation, and their expansion in relation to long-term energy conservation and management policies and statewide development requirements, and in the manner and in accordance with the policies set forth in the Chapter." Chapter 62 of the North Carolina General Statutes has been held to be a single, integrated plan for the regulation of the services and charges of public utilities with the primary purpose of assuring the public of adequate service at a reasonable charge. *State ex rel. Utilities Commission v. General Telephone Company of Southeast,* 285 N.C. 671, 208 S.E.2d 681 (1974). This comprehensive, "integrated plan" includes detailed ratemaking provisions, requirements concerning certificates of public convenience and necessity, and provisions related to affiliated and subsidiary companies. The Commission has long exercised its authority under Chapter 62, which includes the exercise of its discretion in innumerable instances, and has been upheld by the North Carolina courts in so doing. *State ex rel. Utilities Commission v. General Telephone Company,* 281 N.C. 318, 189 S.E.2d 705 (1972), *Corporation Commission v. Henderson Water Company,* 190 N.C. 70, 128 S.E. 467 (1925).

A very large majority of the retail electric service provided in North Carolina is supplied by three investor-owned, regulated electric utilities, all of which also serve at least one other state and have at least one generating unit in another state. The rates paid by North Carolina consumers for this electricity, a large percentage of which cover fuel costs and related expenses, are currently set by North Carolina Utilities Commission after careful scrutiny and review. The Minnesota Supreme Court decision, if allowed to stand, could result in an undermining of the Commission's authority and discretion in this area of great importance and concern.[5]

In addition to this general interest, North Carolina customers of Virginia Electric and Power Company ("Vepco") have an immediate interest in that Vepco has suggested that its parent, Dominion Resources, Inc., may create a separate subsidiary to own the electric generating facilitites currently owned by Vepco. This could have far-reaching consequences of even greater magnitude than the situation involved in the North States Power Company arrangement.

The long-standing balance between state and federal jurisdiction has been upset by the Minnesota Supreme Court's decision. This shift, if allowed to stand, can significantly affect the rates paid by North Carolina customers while depriving them of representation in a large party of the ratemaking process. The State Public Utilities Commissions, the consumer-oriented staffs, such as the Public Staff of North Carolina, if any, and the Attorneys General from all fifty states may well feel com-

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5. Expenses related to fuel range from 40-60% of each of the utilities' total expenses.

pelled to intervene and become active in proceedings before FERC in order to protect the interests of the citizens of each of their states. Should the Minnesota decision be reversed, traditional state ratemaking review can continue, thus avoiding the great costs and complications involved in such proceedings.

STATEMENT OF OHIO'S INTEREST

The Ohio Public Utilities Commission does not allow recovery by utility companies of costs associated with cancelled plants. The Ohio Supreme Court in *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St. 2d 153 (1981) held that such costs were not legitimate test year costs, and as allowance for recovery of such costs was held to be inconsistent with the statutory ratemaking formula found in Section 4909.15 Ohio Rev. Code. *Id.* The Court in two subsequent cases found that the disallowance of cancelled plant costs did not constitute confiscation of private property without due process. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 4 Ohio St. 3d 107 (1983), App. dismissed for want of substantial federal question, U.S. Supreme Court Docket No. 83-43, (October 3, 1983); *Dayton Power & Light Co. v. Pub. Util. Comm.*, 4 Ohio St. 3d 91 (1983). For companies subject to the jurisdiction of the Public Utilities Commission of Ohio, the costs associated with cancelled plants are non-recoverable.

Presently, one major holding company, American Electric Power Company (AEP) operates in Ohio. One of AEP's Ohio subsidiaries, Columbus and Southern Ohio Electric Company (C&SOE) has approximately a 25.4% ownership interest in the Zimmer Nuclear Power Plant.

The plant has been cancelled as a nuclear facility with present plans to convert the plant to a coal facility. The transmission facilities and production facilities for the AEP companies are allocated by allocation agreements submitted to and approved by FERC. Potentially, the Minnesota Supreme Court decision could have a substantial impact on Ohio's consumers if a large portion of Zimmer is written off and allocated through the production allocation agreement.

CONCLUSION

For the reasons set forth above, the undersigned *Amici* respectfully pray the Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Minnesota entered in this proceeding on January 27, 1984.

Dated: 29 May 1984

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General
State of North Carolina

JO ANNE SANFORD
Special Deputy Attorney General
Counsel of Record
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7214

ANGELINE M. MALETTO
Associate Attorney General
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-7214